IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 540

NELSON FOSTER AND GEORGE PAYNE,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

BRIEF FOR PETITIONERS.

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TABLE OF CONTENTS.

	PAGE
Opinion below	1
Jurisdiction	2
Constitutional provision involved	2
Question presented	2
Statement of the case	3
Summary of argument	6
Argument	8
I. The petitioners were not advised of their right to counsel, did not waive this right, and despite their special need for advice of counsel because of the difficult legal questions involved, their conviction and sentencing were hurried through without any assistance of counsel	8
A. The court did not advise petitioners of their right to counsel or offer them the assistance of counsel, nor did they receive any assistance from counsel	8
B. Petitioners were rushed through trial on serious offenses without opportunity for reflection or consideration	12
C. Under the circumstances of this case the assistance of counsel was essential for a fair trial	13
II. The failure to advise petitioners of their right to counsel or to offer them counsel deprived them of their right to a fair hearing guaranteed by the due process clause of the Fourteenth Amendment	18
A. The necessity for assistance of counsel exists at all stages of the proceeding and is not dispensed with by a plea of guilty	19

PAGE

B. The accused must be advised of his constitutional right to counsel, and a request for counsel is not necessary 21

C. The cases relied on by Respondent do not support the decision below 24

III. The petitioners having been denied due process of law, the sentence and judgment against them are void 28

Conclusion 29

TABLE OF CASES CITED.

Adams v. U. S. ex rel McCann, 317 U. S. 269 26

Avery v. Alabama, 308 U. S. 444 19

Ball v. United States, 140 U. S. 118 12

Betts v. Brady, 316 U. S. 455 .....7, 25, 26, 27, 28

Canizio v. New York, 327 U. S. 82 .....19, 21, 23, 27, 28

Carter v. Illinois, 329 U. S. 173 .....7, 8, 9, 19, 25, 26

De Meerleer v. Michigan, 313 Mich. 548, 21 N.W. (2d) 849 24

De Meerleer v. Michigan, ... U. S. ....., 67 S. Ct. 596 (1947) 19, 21, 23, 25

Glasser v. United States, 315 U. S. 60 .....26, 28

Grosjean v. American Press Company, 297 U. S. 233 19

Ex Parte Hawk, 321 U. S. 114 19

Hawk v. Olsen, 326 U. S. 271 .....18, 26

House v. Mayo, 324 U. S. 42 .....19, 21, 27

Johnson v. Zerbst, 304 U. S. 458 .....26, 29

Lewis v. United States, 146 U. S. 370 12

Love v. People, 160 Ill. 501, 43 N. E. 710 15

Moore v. Dempsey, 261 U. S. 86 28

People v. Batey, 392 Ill. 390, 64 N. E. (2d) 875 11

People v. Bernovich, 391 Ill. 141, 62 N.E. (2d) 691 9

People v. Carter, 391 Ill. 594, 63 N. E. (2d) 763, aff'd *sub. nom* Carter v. Illinois, 329 U. S. 173 (1946) 5

People v. Childers, 386 Ill. 312, 53 N. E. (2d) 878 11

PAGE

People v. Corbett, 387 Ill. 41, 55 N. E. (2d) 74 .....9, 11
People v. Corrie, 387 Ill. 587, 56 N. E. (2d) 767 10
People v. Fuhs, 390 Ill. 67, 60 N. E. (2d) 205 .....10, 11
People v. Kawoleski, 310 Ill. 498, 142 N. E. 169 11
People v. Keene, 391 Ill. 305, 63 N. E. (2d) 509 15
People v. Kelly, 274 Ill. 556, 113 N. E. 926 15
People v. Lavendowski, 326 Ill. 173, 157 N. E. 193 10
People v. Myler, 374 Ill. 72, 28 N. E. (2d) 83 15
People v. Peters, 246 Ill. 351, 92 N. E. 889 4
People v. Poepp, 394 Ill. 216, 68 N. E. (2d) 254 27
People v. Pond, 390 Ill. 237, 61 N. E. (2d) 37 11
People v. Stubblefield, 391 Ill. 609, 63 N. E. (2d) 762 10
People v. Tyson, 393 Ill. 108, 65 N. E. (2d) 796 4
People v. Valentino, 354 Ill. 584, 188 N. E. 825 5
People v. Wells, 393 Ill. 626, 66 N. E. (2d) 866 5
People v. Wilson, 391 Ill. 463, 63 N. E. (2d) 488 4
Powell v. Alabama, 287 U. S. 45 .....19, 29
Price v. People, 109 Ill. 109 15
Rice v. Olson, 144 Neb. 547, 14 N. W. (2d) 850 22
Rice v. Olson, 324 U. S. 786 .....19, 21, 22, 25, 27
Ruth v. The People, 99 Ill. 185 15
Smith v. O'Grady, 312 U. S. 329 29
Tomkins v. Missouri, 323 U. S. 485 .....19, 21, 27
White v. Ragen, 324 U. S. 760 .....19, 23, 27
Wiliams v. Kaiser, 323 U. S. 471 .....19, 20, 25, 27, 28
Yoe, Impl'd v. People, 49 Ill. 410 14

PAGE

OTHER CITATIONS.

Arado, *Criminology in Vignette,* Chicago Bar Record, Jan. 1946, p. 102 19

Chicago Crime Commission, *Criminal Justice,* May 1945, p. 13 17

Fourteenth Amendment to the Constitution, Section 1 2

Glueck, *Crime and Justice* (1936), p. 241 19

Illinois Association for Criminal Justice, *Illinois Crime Survey* (1931), p. 82 17

Illinois Constitution, Art. II, Section 9 9

Illinois Habitual Criminal Statute (Ill. Rev. Stat. (1935), Ch. 38, par. 631; (1945), Ch. 38, par. 602) 27

Ill. Rev. Stat. (1935), Ch. 38—par. 65 ..... 4, 14
par. 380 14
par. 382 16
par. 631 27
par. 754 9

Ill. Rev. Stat. (1945), Ch. 38—par. 84 ..... 4, 14
par. 387 14
par. 389 16
par. 602 27
par. 730 9

Judicial Code (28 U. S. C. §344), Section 237 (b) 2

McKinney's Cons. Laws of N. Y., Vol. 39, Art. 190, Secs. 2120-29 23

Mich. Stat. Ann., 28.548 (Sec. 216) 23

National Commission on Law Observance and Enforcement, *Report on Lawlessness in Law Enforcement,* Vol. IV, pp. 7, 281, 341 (1931) 19

Nebraska Rev. Stat. (1943), Secs. 28-532 to 28-537 22

Pound, *The Administration of Justice in the Modern City,* 26 Harv. L. Rev. 302, 319 (1913) 19

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BRIEF FOR THE PETITIONERS.

This case is before the Court on writ of certiorari granted February 3, 1947 (R. 16), to review a decision of the Supreme Court of Illinois (R. 8) affirming a judgment of the Circuit Court of Pulaski County, Illinois, entered February 22, 1935, sentencing the petitioners to imprisonment for one year to life on their plea of guilty to the crimes of burglary and larceny (R. 3-4).

Opinion Below.

The opinion of the Supreme Court of Illinois (R. 8-10) is reported at 394 Ill. 194, 68 N.E. 2d 252.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code (28 U.S.C. § 344) providing for review by certiorari of a final judgment of the highest court of a state in any cause in which a right is claimed under the Constitution of the United States.

The decision of the Supreme Court of Illinois was filed on May 21, 1946 (R. 8-11), and a petition for rehearing was denied on September 12, 1946. Orders granting petitioners' motion for leave to proceed in *forma pauperis* and allowing certiorari were entered by this Court on February 3, 1947.

Constitutional Provision Involved.

Section 1 of the Fourteenth Amendment to the Constitution provides, so far as is material here:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law * * *"

Question Presented.

Petitioners were indicted for the serious crimes of burglary and larceny, handed a copy of the indictment, and arraigned. In order intelligently to plead, it would have been necessary for petitioners to analyze the legalistic verbiage of the indictment, to understand the applicable Illinois statutes and decisions, and to know the practice of accepting pleas of guilty to lesser offenses (such as larceny which carried a maximum penalty of one year) as a trade for dismissing more serious charges such as burglary (the mandatory sentence for which was one year to life). Notwithstanding their special need of counsel under these circumstances, on the same day the indictment was handed down petitioners were arraigned, their pleas of guilty were accepted, and they were sentenced for one year

to life. At no time were they offered counsel or advised of their right to counsel, or did they receive any assistance from counsel.

The question is whether under these circumstances the failure of the trial court to advise petitioners of their right to counsel or to offer counsel constituted a denial of due process of law in contravention of the Fourteenth Amendment.

Statement of the Case.

On February 22, 1935, each petitioner was indicted for both burglary and larceny. The indictments were printed forms consisting of two paragraphs not designated as counts or otherwise identified (Original Record, p. 4). The first paragraph of the indictment charged the burglarious breaking and entry of a dwelling house and the larceny of $5 worth of property from it; the second paragraph charged the burglarious entry of the same dwelling house without breaking and larceny of $5 worth of property from it.*

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* Close reading by one familiar with criminal law is necessary to distinguish the two paragraphs; they are identical with the exception of certain words of art in the middle of each paragraph. The first paragraph uses the words:

> "willfully, maliciously, forcibly, feloniously and burglariously did break and enter with intent, the goods * * * feloniously to take, steal and carry away, and * * * the goods * * * did feloniously take, steal and carry away,"

while the second paragraph states:

> "willfully, maliciously, burglariously, feloniously, and without force, the doors and windows thereof being open, did enter, with intent the goods * * * feloniously to take, steal and carry away, and * * * the goods * * * did feloniously take, steal and carry away."

Petitioners were arraigned the same day, pleaded guilty, and within a few minutes were given sentences of one year to life (the mandatory sentence for burglary*) which, under Illinois law, is a life sentence.** They were still confined at the penitentiary at the time of the filing of the petition for certiorari.

The minutes from the Judge's Docket as to the court proceedings (R. 3-4) are as follows:

> "Feb. 22, 1935, — The defendants Nelson Foster and George Payne, alias Elijah Jefferson and Alex Thames, having been furnished with a copy of the Indictment and a list of the Jurors and Peoples Witnesses and are advised of their rights of Trial and of the consequences of an entry of a plea of guilty and being arraigned in open Court for plea to the Indictment says, each for himself that he is guilty of burglary and larceny as charged in the indictment and thereupon the Court advises and admonishes each of said defendants of the consequences of entering such pleas of guilty and Thereafter each of said defendants still persist in such pleas of guilty, and Thereafter each of said defendants still presist in such pleas of guilty, Whereupon said pleas of guilty are received and entered of record.
>
> "The Court finds the ages of said defendants to be as follows, respectively, Nelson Foster 34 years old, George Payne, alias Elijah Jefferson 48 years, Alex Thames, 21 years old.
>
> "It is the Judgment and sentence of the Court upon said pleas of guilty that each of said defendants, Nelson Foster, George Payne, alias Elijah Jefferson and Alex Thames, be forthwith committed to The Illinois State Penitentiary and there confined until released in due course of law, said imprisonment to be for a

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* Ill. Rev. Stat. (1935), Chapter 38, par. 65; (1945), Chap. 38, par. 84.

** See, e. g., **People v. Peters**, 246 Ill. 351, 92 N. E. 889 (1910); **People v. Wilson**, 391 Ill. 463, 63 N. E. (2d) 488 (1945); **People v. Tyson**, 393 Ill. 108, 110, 65 N. E. (2d) 796, 797 (1946).

period of not less than one year and may extend to life time, and that they pay the cost of this suit."

On January 23, 1946, the Supreme Court of Illinois granted petitioners' motion for leave to sue out a writ of error as a poor person (R. 1). On February 7, 1946, petitioners filed with said court an Abstract of Record and a Statement and Argument, the latter reciting errors relied upon (R. 5-7). Among these were the denial of their rights under the Fourteenth Amendment by reason of their being hurried through trial on a serious criminal charge without assistance of counsel or the offer thereof, despite their inability to defend themselves.

On May 21, 1946, the Supreme Court of Illinois handed down an opinion and decision affirming the judgment of the Circuit Court of Pulaski County. The court considered the contentions as to right to counsel and undue expedition of trial on the merits. Although petitioners had based their argument that their conviction was illegal primarily upon the Fourteenth Amendment to the Federal Constitution (see Statement, Brief and Argument in behalf of plaintiffs in error, Original Record, p. 22 *et seq.*, omitted in printing), the opinion referred solely to Illinois cases. The court apparently believed that if the Illinois rule as to counsel was satisfied, this automatically met the requirements of the due process clause. The court concluded that there was no error or abuse of discretion under the Illinois authorities and affirmed the judgment (R. 9-10, quoted *infra*, p. 11).*

* Petitioners had also alleged that before arraignment they were told by the State's Attorney that they did not need counsel and would be sentenced merely to one year in the penitentiary and would then be released on parole (R. 7). The Illinois Court refused to consider this matter as the charge was not supported by any fact appearing in the common law record (R. 10). This is the Illinois rule on consideration of writs of error. **People v. Carter**, 391 Ill. 594, 63 N. E. 2d 763 (1945), aff'd **sub. nom Carter v. Illinois**, 329 U. S. 173 (1946). The mittimus is not part of the common law record under this rule. **People v. Valentino**, 354 Ill. 584, 188 N. E. 825 (1933); **People v. Wells**, 393 Ill. 626, 66 N. E. 2nd 866 (1946).

On June 7, 1946, petitioners filed a petition for rehearing (R. 12-15), again alleging that they had not waived any constitutional rights and relying upon the Fourteenth Amendment and cases in this Court arising thereunder. The Supreme Court of Illinois denied the petition for rehearing on September 12, 1946 without opinion (R. 15).

Petitioners filed a petition for writ of certiorari in this Court on September 26, 1946 (R. 16). On February 3, 1947, this Court granted petitioners' motion for leave to proceed in *forma pauperis* and allowed the writ of certiorari (R. 15, 16). The undersigned was appointed counsel for petitioners on March 10, 1947.

Summary of Argument.

The record shows that petitioners, on trial for serious crimes, were not given any assistance from counsel, offered the assistance of counsel, or even advised of their right to the assistance of counsel. This resulted from the Illinois rule that accused must request counsel and state under oath their inability to procure counsel, a rule strikingly at variance with the requirements of due process established by recent decisions of this Court. Despite their need of counsel because of the difficult and complex questions involved—questions the existence of which petitioners could not have suspected, much less been able to decide—they were hurried to trial, their pleas of guilty were accepted and they were sentenced to the penitentiary.

Under these circumstances, petitioners were plainly deprived of their fundamental right to counsel guaranteed by the Fourteenth Amendment to the Constitution as an integral part of due process of law. In recent years this Court has defined the particular applications of the con-

stitutional rule pertaining to the facts at bar, and reversed convictions on substantially identical records. The two Federal cases relied on by Respondent are not in point. *Carter* v. *Illinois* * was decided on a question of waiver of right to counsel, and there is no waiver here. *Betts* v. *Brady* ** is also distinguishable on its facts, and to the extent inconsistent with the decisions on which petitioners rely, has been overruled.

Petitioners' conviction was therefore void and the decision of the Supreme Court of Illinois should be reversed.

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* 329 U. S. 173 (1946).

** 316 U. S. 455 (1942).

Argument.

I.

THE PETITIONERS WERE NOT ADVISED OF THEIR RIGHT TO COUNSEL, DID NOT WAIVE THIS RIGHT, AND DESPITE THEIR SPECIAL NEED FOR ADVICE OF COUNSEL BECAUSE OF THE DIFFICULT LEGAL QUESTIONS INVOLVED, THEIR CONVICTION AND SENTENCING WERE HURRIED THROUGH WITHOUT ANY ASSISTANCE OF COUNSEL.

Petitioners were indicted on February 22, 1935. On the same day they were arraigned, furnished a copy of the indictment, advised merely of their right of trial, pleaded guilty, and were sentenced, all without the assistance of counsel, the offer of counsel, or even any advice that they were entitled to counsel.

A. THE COURT DID NOT ADVISE PETITIONERS OF THEIR RIGHT TO COUNSEL OR OFFER THEM THE ASSISTANCE OF COUNSEL, NOR DID THEY RECEIVE ANY ASSISTANCE FROM COUNSEL.

These facts sharply differentiate this case from *Carter* v. *Illinois*, 329 U. S. 173 (1946), in which a majority of five Justices found that the defendant was advised of his right to counsel and waived that right. The minutes of the trial judge in the *Carter* case stated (329 U. S. 177) that:

> "• • • The Court fully explained to the defendant • • • all his rights in the premises, *including the right to have a lawyer appointed by the Court to defend him* and also • • • his right to trial."

The minutes of the trial judge in this case (R. 3) state only that petitioners

> "• • • were advised of their rights of Trial and of the consequences of an entry of a plea of guilty • • •"

Nor is the reason for the difference far to seek. *Carter* v. *Illinois, supra*, was a capital case. Although the Illinois Constitution provides that "• • • In all criminal prosecu-

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• Emphasis is supplied throughout this brief unless otherwise noted.

tions the accused shall have the right to defend in person and by counsel * * *" (Ill. Constitution, Art. II, § 9), this provision has been construed merely as entitling the defendants to be represented by counsel, and the Illinois rule is that the right to have counsel appointed by the court is entirely dependent upon statute. *The People* v. *Corbett*, 387 Ill. 41, 43, 55 N.E. 2nd 74, 75 (1944).

The Illinois statute provides that:

> "Whenever it shall appear to the court that a defendant or defendants indicted in a capital case, is or are indigent and unable to pay counsel for his or her defense, it shall be the duty of the court to appoint one or more competent counsel for said defendant or defendants, who shall receive a reasonable sum for services * * *."
>
> Ill. Rev. Stat. (1935), Chap. 38, par. 754; (1945), Chap. 38, par. 730.

Consequently, in a capital case such as the *Carter* case the judge is apparently under an affirmative duty, once it appears that defendants are indigent, to offer to appoint counsel for them.*

In a non-capital case such as this, however, the following portion of the Illinois statutes applies:

> "* * * Every person charged with crime shall be allowed counsel, and when he shall state upon oath that he is unable to procure counsel, the court shall assign him competent counsel, who shall conduct his defense."
>
> Ill. Rev. Stat. (1935), Chap. 38, par. 754; (1945), Chap. 38, par. 730.

And the Illinois Supreme Court has consistently construed this provision as necessitating the appointment of counsel only when a defendant (a) requests counsel and (b) states under oath that he cannot procure counsel.

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*But cf. **People v. Bernovich**, 391 Ill. 141, 143, 62 N.E. 2nd 691 (1945).

In *People* v. *Lavendowski*, 326 Ill. 173, 176, 157 N.E. 193, 194 (1927), the court stated the Illinois rule as follows:

> "The constitutional provision that a person charged with crime shall have the right to appear and defend by counsel, and the provision of the statute that he shall be allowed counsel or the same shall be appointed for him upon his statement, under oath, that he cannot procure such assistance, *does not place upon the court the duty to proffer the services of counsel,* • • •"

Thus in *People* v. *Corrie*, 387 Ill. 587, 589, 56 N.E. 2nd 767, 769 (1944), the court made clear that the Illinois rule does not necessitate advising defendants of their right to counsel, stating:

> "Claiming an infringement of his constitutional rights, defendant insists that the court erred in receiving and entering his plea of guilty without first advising him of his right to legal counsel and in failing to appoint counsel for him. • • • No duty rests upon the trial court to provide counsel for a defendant unless he states, upon oath, that he is unable to procure counsel. (*People* v. *Corbett*, *ante*, p. 41; *People* v. *Childers*, 386 Ill. 312; *People* v. *Lavendowski*, 326 Ill. 173; *People* v. *Kawoleski*, 310 Ill. 498.)"

See also *People* v. *Fuhs*, 390 Ill. 67, 68, 60 N.E. 2d 205, 206 (1945).

In fact, the Illinois rule is that the defendants are deemed to have waived their right to counsel unless they expressly claim said right and state under oath their inability to procure counsel. Thus in *People* v. *Stubblefield*, 391 Ill. 609, 610, 63 N.E. 2nd 762, 763, the court said:

> "Plaintiff in error also contends that his constitutional rights were violated by failing to provide him with assistance of counsel. The right to be represented by counsel is one which the accused may claim or waive, as he chooses. No duty rests upon the court to provide counsel for the accused unless the latter states on oath his inability to procure counsel and expresses his desire to have such appointed."

These and similar statements have consistently been quoted, cited and applied. See, *e.g.*, *People* v. *Kawoleski*, 310 Ill. 498, 500, 142 N.E. 169, 170 (1923); *People* v. *Childers*, 386 Ill. 312, 314, 53 N.E. 2d 878, 879 (1944); *The People* v. *Corbett, supra*, 387 Ill. 41, 55 N.E. 2nd 74 (1944); *People* v. *Pond*, 390 Ill. 237, 61 N.E. 2nd 37 (1945); *People* v. *Batey*, 392 Ill. 390, 64 N.E. 2nd 875 (1946).

The opinion of the Supreme Court of Illinois in this case makes clear that petitioners were denied relief on the basis of these rules. The court stated (R. 9):

> "It is first contended by plaintiffs in error that they did not have counsel appointed to represent and protect their rights. It is not shown by the record that the defendants informed the court or in any way indicated that they desired counsel. We have repeatedly held that the right to be represented by counsel is a personal right which a defendant may waive or claim as he himself may determine. (*People* v. *Fuhs*, 390 Ill. 67). This contention is without merit."

The Supreme Court of Illinois considered the above and the fact that petitioners were hurried through to conviction in less than ten minutes, but found nothing therein to indicate that petitioners did not have the "fair trial" guaranteed by due process of law (R. 10).

The summary common law record in this case must be viewed in the light of the Illinois rule. So interpreted, it is clear that petitioners were not advised of their right to counsel or offered the assistance of counsel at any time during the proceedings. And even the presumption that the trial judge discharged his duty in which the Illinois Supreme Court indulges (*People* v. *Corbett*, 387 Ill. 41, 43, 55 N.E. 2nd 74, 75 (1944); *People* v. *Fuhs, supra*, 390 Ill. 67, 68, 60 N.E. 2nd 205, 206 (1945)), does not suggest the

contrary. Conceding *arguendo* the validity of such a presumption,* it implies merely that the *Illinois rule* was not violated, i. e., that the fact that counsel was not appointed for petitioners infers that they did not request such appointment and state under oath their inability to procure counsel. By no stretch of the imagination can it be implied that the requirements of the Fourteenth Amendment to the Constitution, as interpreted by this Court—requirements which the Illinois courts have signally failed to note—were complied with.

B. PETITIONERS WERE RUSHED THROUGH TRIAL ON SERIOUS OFFENSES WITHOUT OPPORTUNITY FOR REFLECTION OR CONSIDERATION.

The record further shows that petitioners were indicted, arraigned and sentenced without opportunity for reflection or consideration of their course of action or the consequences of their pleas of guilty. The indictment was presented on February 22, 1935 (R. 1-3). The judge's minutes (R. 3) show that on the same day petitioners were advised of their right to a trial and the consequences of a plea of guilty, that they pleaded guilty, and were sentenced. The full length of the colloquy could have been only a few minutes. Even if petitioners had been capable of comprehending the situation, there was no time allowed or taken for reflection or consideration. Plainly, they received short shrift. And it is noteworthy that their charge that the entire proceedings occupied but ten minutes (Application for writ of error, Pars. IV and IX, R. 6-7) has nowhere been denied. See briefs of State of Illinois to Illinois Supreme Court, Original Record, page 39, omitted in printing, and in opposition to certiorari. On the con-

* Compare **Ball v. United States**, 140 U. S. 118 (1891), and **Lewis v. United States**, 146 U. S. 370, 373 (1892), holding that the fact of presence of the accused during his trial must be affirmatively shown and cannot be presumed.

trary, the Supreme Court of Illinois accepted this allegation as a fact (R. 10), apparently viewed the question as solely one of the trial court's discretion, and found no abuse thereof.

C. UNDER THE CIRCUMSTANCES OF THIS CASE THE ASSISTANCE OF COUNSEL WAS ESSENTIAL FOR A FAIR TRIAL.

Petitioners were obviously in need of counsel and incapable of performing the formidable task of defending themselves. The indictment handed them is couched in legal phraseology bewildering and confusing to a layman. A single printed page form (Original Record, p. 4) combines two paragraphs, each of which charges both burglary and larceny. The typed-in material—the factual data—is the same in both; the distinction lies in the print. The first paragraph charges that petitioners "willfully, maliciously, forcibly, feloniously and burglariously did * * * enter"; the second that petitioners "willfully, maliciously, burglariously and without force, the doors and windows thereof being open, did enter with intent the goods and chattels * * * there being found, feloniously to take, steal and carry away." Both paragraphs further charge that the petitioners "did feloniously take, steal and carry away" goods and chattels of the value of $5.00, constituting larceny. The use of two paragraphs and the combination in each of both burglary and larceny is confusing even to an attorney. A defendant unversed in the law and under the strain of accusation of a serious crime could by a swift glance not even perceive, much less understand, the difference between the four charges.*

* Petitioners claim that at the time of their indictment and conviction they were unable to read or write. (Brief in Support of Petition for Writ of Certiorari, p. 8.) The documents they filed **pro se** evidence their inability to analyze legal verbiage or to cope with close and complex legal questions.

And even intelligent reading of the indictment would have left the petitioners far from equipped to determine their proper course. Under Illinois law, burglary consists of either a forcible breaking or entering, or an entry without force but with intent to commit a felony or larceny.* Larceny is the felonious stealing or taking away of the personal goods of another, including "private stealing • • • from a house in the day time."** Burglary and larceny are two separate and distinct crimes of which larceny is the lesser. *Yoe, Impl'd* v. *People*, 49 Ill. 410 (1868).

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* The statute reads:

"Whoever wilfully and maliciously and forcibly breaks and enters, or wilfully and maliciously, without force (the doors or windows being open), enters into any dwelling-house, kitchen, office, shop, store-house, warehouse, malt-house, stilling-house, mill, pottery, factory, wharfboat, steamboat, or other water craft, freight or passenger railroad car, church, meeting house, school-house, or other building, with intent to commit murder, robbery, rape, mayhem, or other felony or larceny shall be deemed guilty of burglary and be imprisoned in the penitentiary for any term of years not less than one year or for life."

Ill. Rev. Stat. (1935) Chap. 38, par. 65; (1945) Chap. 38, par. 84.

** The statute reads:

"Larceny is the felonious stealing, taking and carrying, leading, riding or driving away the personal goods of another.. Larceny shall embrace every theft which deprives another of his money or other personal property, or those means or muniments by which the right and title to property, real or personal, may be ascertained. Private stealing from the person of another, and from a house in the day time, shall be deemed larceny. Larceny may also be committed by feloniously taking and carrying away any bond, bill, note, receipt or any instrument of writing of value to the owner."

Ill. Rev. Stat. (1935) Chap. 38, par. 380; (1945) Chap. 38, par. 387.

Where a defendant is on trial for both offenses, the jury must determine which has been established. *Ruth* v. *The People*, 99 Ill. 185 (1881); *Love* v. *People*, 160 Ill. 501, 43 N.E. 710 (1896). The distinction depends on intent at the time of entry and illegal intent sufficient to constitute burglary cannot be inferred from the mere commission of larceny after entry. Thus in *People* v. *Kelly*, 274 Ill. 556, 558, 113 N.E. 926, 927 (1916), the court reversed a conviction for burglary although larceny was proved, stating (p. 558):

> "He may have taken advantage of the opportunity to commit larceny, but his presence in the store is as consistent with his innocence as with his guilt of the criminal intent at the time of his entry. * * * The plaintiff in error cannot be rightfully convicted of burglary merely because he stole while in the store, if he did steal."

For the distinctions between the two crimes, and the necessity of intent, see also. *People* v. *Myler*, 374 Ill. 72, 75, 28 N.E. 2nd 83, 84 (1940), reversing conviction for burglary; *People* v. *Keene*, 391 Ill. 305, 63 N.E. 2nd 509 (1945); cf. *Price* v. *People*, 109 Ill. 109 (1884), conviction for burglary reversed by divided court because of insufficiency of proof of intent.

Thus Appellate Courts have differed with trial judges and members of the Illinois Supreme Court have differed between themselves as to the intent and other elements necessary for conviction of the crime of burglary, and the distinction between that crime and larceny, a distinction which petitioners could in no wise have appreciated. And the difference, important in all cases, was the more so because of the small amount here involved. The indictment charged entry and the taking away of goods of the value

of $5.00. If the entry constituted burglary, the sentence of one year to life imprisonment imposed upon petitioners was mandatory (R. 9-10). Under Illinois law, this is a life sentence. (*Supra*, p. 4.) On the other hand, if larceny alone was involved the maximum sentence was one year in the county jail.* Consequently on the difference between burglary and larceny depended the difference between a maximum term of one year in the county jail and a sentence of one year to life in the penitentiary.

As their application for writ of error states, petitioners were unable to defend themselves (R. 5) and did not obtain information as to the procedure (R. 7). They were confronted with numerous and difficult questions of law: whether their entry was forcible so as to constitute burglary under the first count; whether, although without force, it was with illegal intent as charged under the second count; whether their actions failed to constitute burglary but amounted to larceny; or whether they were guilty of any crime at all.

And there was also a tactical problem of pleading. Conviction for burglary carried a mandatory life sentence;

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* The Illinois statute provides:

"Every person convicted of larceny if the property stolen exceeds the value of fifteen dollars, or if the property is stolen from the person of another, shall be imprisoned in the penitentiary for not less than one, nor more than ten years; if the property stolen has not been stolen from the person of another and is of the value of fifteen dollars, or less, the person convicted shall be confined in the county jail, or sentenced to labor in the workhouse of the county, city, or town, where the conviction is had, or on the streets or alleys of the city, or on the public roads in the county, or to such labor under the direction of the sheriff as the county board may provide for, not exceeding one year, and fined not exceeding one hundred dollars."

Ill. Rev. Stat. (1935), Chap. 38, par. 382; (1945), Chap. 38, par. 389.

that for larceny of $5 a maximum sentence of one year in the county jail. If a plea of guilty were to be entered, one to the lesser of the two offenses might well have been sufficient. The practice of accepting pleas of guilty to lesser offenses is general throughout the United States and thoroughly ingrained in Illinois procedure. Although no statistics covering the year 1935 have been found, during 1926 66.49 per cent of the 2,823 pleas of guilty entered in the State were to the lesser of two offenses charged.* In 1933 41 per cent of the total of 4,101 indictments presented in Cook County were tried on waivers of the more serious offense.** Under such circumstances and in view of the mandatory sentence upon conviction of burglary, petitioners' pleas of guilty to both the offenses of burglary and larceny alone suffice to evidence their ignorance, inexperience, and inability to defend themselves. They had nothing to gain and everything to lose by this course. ***

The record, therefore, shows the following: Petitioners were indicted for serious offenses. They were furnished a copy of the indictment, a document difficult to the point of being impossible for a layman to understand. Moreover, understanding not only of the indictment but of the intricacies of the Illinois statutes defining burglary and larceny and of the complex questions arising thereunder was necessary for them to determine whether or not they were guilty

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* Illinois Association for Criminal Justice, **Illinois Crime Survey** (1931), p. 82. During 1927 more than one-third of the 1637 inmates of Pontiac Prison had been sentenced on pleas of guilty to the lesser of several offenses charged. **Ibid.** 473.

** Chicago Crime Commission, **Criminal Justice**, May, 1945, p. 13.

*** The pleas are in fact explicable at all only upon the basis charged in their application for writ of error (R. 7), that they had been told by the State's Attorney that they would receive a sentence of one year and be paroled.

of the offenses charged. And, even assuming *arguendo* their guilt, there remained the question whether the prosecution and the court would, in accordance with customary practice, accept a plea of guilty to the lesser of the offenses charged. On all these matters the effective assistance of counsel was necessary for informed and intelligent decision. But petitioners were not offered the assistance of counsel, were not advised of their right to counsel, and were not even given time to reflect before determining their course. They did not even have the chance to waive counsel. Instead they were arraigned before a judge who advised them both of their right to trial and of the consequences of guilty pleas before even requesting them to plead, reiterated this formal notification after they had pleaded guilty, entered the pleas and imposed sentence. The entire proceeding occupied but a few minutes.

So understood, petitioners' situation is identical with those of the defendants whom this Court has held were denied due process of law by reason of failure of the trial court to appoint or offer the assistance of counsel. These decisions are quoted and discussed in Point II, *infra*, and we here state only the epitome of the rule, as phrased by Mr. Justice Reed in *Hawk* v. *Olson*, 326 U. S. 271, 278 (1945):

> "• • • The defendant needs counsel and counsel needs time."

In this case petitioners were afforded neither.

II.

THE FAILURE TO ADVISE PETITIONERS OF THEIR RIGHT TO COUNSEL OR TO OFFER THEM COUNSEL DEPRIVED THEM OF THEIR RIGHT TO A FAIR HEARING GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

A long line of decisions of this Court establishes that the right to counsel in criminal cases in state courts is one of

the "fundamental rights" guaranteed by the due process clause of the Fourteenth Amendment. *Powell* v. *Alabama*, 287 U. S. 45 (1932); *Grosjean* v. *American Press Company*, 297 U. S. 233, 243-244 (1936); *Avery* v. *Alabama*, 308 U. S. 444, 446-447 (1939); *Ex Parte Hawk*, 321 U. S. 114; *Williams* v. *Kaiser*, 323 U. S. 471 (1945); *Tomkins* v. *Missouri*, 323 U. S. 485 (1945); *House* v. *Mayo*, 324 U. S. 42 (1945); *White* v. *Ragen*, 324 U. S. 760 (1945); *Rice* v. *Olson*, 324 U. S. 786 (1945); *Canizio* v. *New York*, 327 U. S. 82 (1946); *Carter* v. *Illinois*, 329 U. S. 173 (1946); *De Meerleer* v. *Michigan*, ... U. S. ....., 67 S. Ct. 596 (1947).* The right has been so accepted that recent decisions of this Court have turned not upon the existence of the right but on subsidiary questions as to whether it has been waived, whether defendants actually received effective assistance of counsel, or whether procedurally the question was properly before this Court. Accordingly we take up first the particular aspects of the constitutional rule here applicable, and next the decisions relied on by Respondent in its opposition to certiorari.

A. THE NECESSITY FOR ASSISTANCE OF COUNSEL EXISTS AT ALL STAGES OF THE PROCEEDING AND IS NOT DISPENSED WITH BY A PLEA OF GUILTY.

In *Williams* v. *Kaiser*, 323 U. S. 471 (1945), this Court held that an accused was deprived of due process of law by his conviction on a plea of guilty in a capital case where he received no assistance from counsel. The following ex-

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* The necessity that accused be afforded counsel as an essential to a fair trial has been recognized by criminologists and textwriters. Glueck, **Crime and Justice** (1936), 241; National Commission on Law Observance and Enforcement, **Report on Lawlessness in Law Enforcement** (1931) 7, 281, 341; Pound, **The Administration of Justice in the Modern City**, 26 Harv. L. Rev. 302, 319 (1913); Arado. **Criminology in Vignette**, Chicago Bar Record, Jan. 1946, page 102.

tract from the opinion is equally applicable to the facts in this case (323 U. S. 474):

"• • • The law of Missouri has important distinctions between robbery in the first degree, robbery in the second degree, grand larceny, and petit larceny. These involve technical requirements of the indictment or information, the kind of evidence required for conviction, the instructions necessary to define the several elements of the crime, and the various defenses which are available. These are a closed book to the average layman. These considerations underscore what was said in *Powell* v. *Alabama, supra,* p. 69: 'Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. *He requires the guiding hand of counsel at every step in the proceedings against him.* Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true it is of the ignorant and illiterate, or those of feeble intellect.' *Those observations are as pertinent in connection with the accused's plea as they are in the conduct of a trial.* The decision to plead guilty is a decision to allow a judgment of conviction to be entered without a hearing—a decision which is irrevocable and which forecloses any possibility of establishing innocence. If we assume that petitioner committed a crime, we cannot know the degree of prejudice which the denial of counsel caused. See *Glasser* v. *United States,* 315 U. S. 60, 75-76. *Only counsel could discern from the facts whether a plea of not guilty to the offense charged or a plea of guilty to a lesser offense would*

be appropriate. A layman is usually no match for the skilled prosecutor whom he confronts in the court room. He needs the aid of counsel lest he be the victim of overzealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment."

See also the companion case of *Tomkins* v. *Missouri,* 323 U. S. 485 (1945).

The same rule has since been applied to non-capital cases, the Court holding that accused were denied due process in their convictions on pleas of guilty without benefit or assistance of counsel, or the offer thereof. See *House* v. *Mayo,* 324 U. S. 42 (1945); *Rice* v. *Olson,* 324 U. S. 786 (1945); *De Meerleer* v. *Michigan,* ..... U. S. ....., 67 S. Ct. 596 (1947); cf. *Canizio* v. *New York,* 327 U. S. 82 (1946).

B. THE ACCUSED MUST BE ADVISED OF HIS CONSTITUTIONAL RIGHT TO COUNSEL, AND A REQUEST FOR COUNSEL IS NOT NECESSARY.

In *Tomkins* v. *Missouri,* 323 U. S. 485 (1945), the Court emphasized that a request for counsel was not necessary to invoke an accused's constitutional right thereto, and that the right was not waived by failure to request counsel, stating (p. 487):

"*Powell* v. *Alabama,* 287 U. S. 45, 71, held that at least in capital cases 'where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeblemindedness, illiteracy, or the like, *it is the duty of the Court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law'. Under that test, a request for counsel is not necessary.* • • •

"The nature of the charge emphasizes the need for counsel. Under Missouri law, one charged with murder in the first degree may be found guilty of that offense, of murder in the second degree, or of manslaughter. • • • The punishments for the offenses are

different. * * * The differences between them are governed by rules of construction meaningful to those trained in the law, but unknown to the average layman. The defenses cover a wide range. And the ingredients of the crime of murder in the first degree as distinguished from the lesser offenses are not simple but ones over which skilled judges and practitioners have disagreements. *The guiding hand of counsel is needed* lest the unwary concede that which only bewilderment or ignorance could justify or pay a penalty which is greater than the law of the State exacts for the offense which they in fact and in law committed."

In *Rice* v. *Olson*, 324 U. S. 786 (1945), the Court had before it a habeas corpus petition alleging that the petitioner, convicted of burglary, a non-capital offense,* upon a plea of guilty, had been deprived of due process of law through the trial court's failure to advise him of his constitutional right to counsel or to provide counsel for him. The writ had been denied by the Nebraska Supreme Court on the basis of a state rule identical in substance with that applied by the Supreme Court of Illinois in this case, that a waiver of constitutional right was implied from the accused's failure to request that counsel be assigned to him, particularly where a guilty plea was entered. *Rice* v. *Olson*, 144 Neb. 547, 14 N.W. 2nd 850, 852 (1944). This Court held the Nebraska rule violative of the Fourteenth Amendment, stating (324 U. S. 788-789):

"* * * *A defendant who pleads guilty is entitled to the benefit of counsel, and a request for counsel is not necessary.* It is enough that a defendant charged with an offense of this character is incapable adequately of making his defense, that he is unable to get counsel, and that he does not intelligently and understandingly waive counsel."

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* Neb. Rev. Stat. (1943), Sec. 28-532 to 537.

Canizio v. *New York*, 327 U. S. 82 (1946), came before the Court on a motion to vacate a sentence for robbery (a non-capital offense*) on the ground that the defendant was deprived of due process by reason of his conviction without representation by counsel and without advice from the court of his right to counsel or assignment of counsel to assist him. The majority of the Court affirmed the conviction on the ground that "petitioner actually had the benefit of counsel" (327 U. S. 82), but made clear that, absent this fact, the failure of the trial court to advise the accused of his right to counsel would have denied due process, stating (327 U. S. 85):

> "Before we consider this question we shall assume that petitioner was without counsel when arraigned and when he pleaded guilty and that although he was unfamiliar with his legal rights the court failed to inform him of his right to counsel. Consequently, had there been nothing to contradict petitioner's general allegation that he was not represented by counsel in the interim between his plea of guilty and the time he was sentenced, his charges would have been such as to have required the court to hold a hearing on his motion. *Rice* v. *Olson*, 324 U. S. 786."

See also *White* v. *Ragen*, 324 U. S. 760 (1945).

The most recent decision of this Court on the question, *De Meerleer* v. *Michigan*, ... U. S. ....., 67 S. Ct. 596 (1947), involved facts parallel to those in this case. The defendant, then 17 years old, was arraigned, tried, convicted of murder (a non-capital offense in Michigan**) and sentenced to life imprisonment in a single day. He was without legal assistance throughout the proceedings and was not advised of his right to counsel. The Supreme Court of Michigan denied relief on the ground that the defend-

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* McKinney's Cons. Laws of N. Y., Vol. 39, Art. 190, Secs. 2120-29.

** Mich. Stat. Ann., 28.548 (Sec. 216).

ant had not requested counsel and was not entitled to counsel as of right, or to be notified of his right to counsel, citing a Michigan rule identical in substance with the Illinois rule applied by the Illinois Supreme Court in this case. See *De Meerleer* v. *Michigan;* 313 Mich. 548, 21 N. W. (2d) 849, 851 (1946).

This Court, in a unanimous *per curiam* opinion, held that the application of the Michigan rule denied the defendant due process, stating (..... U. S. ....., 67 S. Ct. 596, 597):

> "Here a seventeen year old defendant confronted by a serious and complicated criminal charge, was hurried through unfamiliar legal proceedings without a word being said in his defense. At no time was assistance of counsel offered or mentioned to him, nor was he apprised of the consequences of his plea. Under the holdings of this Court, petitioner was deprived of rights essential to a fair hearing under the Federal Constitution. Amend. 14, *Powell* v. *State of Alabama,* 1932, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A.L.R. 527; *Williams* v. *Kaiser,* 1945, 323 U. S. 471, 65 S. Ct. 363, 89 L. Ed. 398; *Tompkins* v. *State of Missouri,* 323 U. S. 485, 65 S. Ct. 370, 89 L. Ed. 407; *White* v. *Ragan,* 1945, 324 U. S. 760, 65 S. Ct. 978, 89 L. Ed. 1348; *Hawk* v. *Olson,* supra. See *Betts* v. *Brady,* 1942, 316 U. S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595."

The principles laid down in the above cases are directly applicable to the facts here, which are in substance identical with those of the prior cases in which this Court has upset similar convictions. We therefore take up next the cases cited by Respondent in opposition to certiorari.

C. THE CASES RELIED ON BY RESPONDENT DO NOT SUPPORT THE DECISION BELOW.

In its brief in opposition to the petition for certiorari Respondent contended that the petitioners received their full rights under the Illinois statute relating to assistance of counsel and the decisions of the Supreme Court of Illinois

interpreting the statute. But the question here is not whether the Illinois rule was applied in accordance with the Illinois decisions, but whether its application in this case contravened the overriding constitutional guarantee of due process of law. Thus in *Williams* v. *Kaiser, supra,* 323 U. S. 471, 473 (1945), the Court stated:

> "• • • But the right to counsel in cases of this type is a right protected by the Fourteenth Amendment of the federal Constitution. The question whether that federal right has been infringed is not foreclosed here, even though the action of the state court was on the ground that its statute requiring the appointment of counsel was not violated. *Powell* v. *Alabama,* 287 U. S. 45, 59-60."

See also *Rice* v. *Olson, supra,* 324 U. S. 786 (1945), and *De Meerleer* v. *Michigan, supra* ..... U. S. ....., 67 S. Ct. 596 (1947), in both of which state court decisions predicated upon compliance with state rules were also reversed for violation of the Fourteenth Amendment. The Illinois cases cited by Respondent are, therefore, wide of the mark, and we turn to a consideration of the only two decisions involving the Fourteenth Amendment cited in opposition to certiorari, *Carter* v. *Illinois, supra,* 329 U. S. 173 (1946), and *Betts* v. *Brady,* 316 U. S. 455 (1941).

In the *Carter* case, as here, the defendant had been convicted following a plea of guilty. However, as stated *supra,* page 8, the record in the *Carter* case included an explicit statement that the defendant had been advised of "all his rights in the premises including the right to have a lawyer appointed by the court to defend him" (329 U. S. 177). A majority of five Justices found in this statement proof that "the accused, with his rights fully explained to him, consciously chose to dispense with counsel" (*Ibid*) and concluded that the defendant had thereby waived his constitutional right to have counsel appointed for him.

There is no question of waiver here. Under the decisions of this Court a waiver must be an intentional relinquishment of a known right; the decision must be made on the basis of an intelligent and informed judgment; and every reasonable presumption against waiver is indulged. *Johnson* v. *Zerbst*, 304 U. S. 458, 464-465 (1938); *Glasser* v. *United States*, 315 U. S. 60, 70 (1942); *Adams* v. *U. S. ex rel. McCann*, 317 U. S. 269, 277-279 (1942); *Hawk* v. *Olson*, *supra*, 326 U. S. 271 (1945). Here petitioner did not even know of his right to counsel; the matter was not referred to at any time. Any claim of waiver, therefore, would be "a tenuous inference from the mere fact of a plea of guilty." *Carter* v. *Illinois*, 329 U. S. 173, 67 S. Ct. 216, 220 (1946). The *Carter* case and the decisions of this Court cited *supra*, pages 18 to 24, show that a plea of guilty does not constitute a waiver of the constitutional right to counsel where, as in this case, the accused were not advised of their right or offered counsel.

The case of *Betts* v. *Brady*, *supra*, 316 U. S. 455 (1942), is also clearly distinguishable on the facts as viewed by the majority. There was no question as to the commission of the offense charged; the sole issue was the veracity of conflicting testimony as to identification. The defendant had been before a criminal court previously; he was not wholly unfamiliar with criminal procedure; witnesses were summoned at his request and examined by him; and he was expressly found by the trial judge to be a man of ordinary intelligence, able to take care of his own interests on the trial of the narrow issue. (*Ibid*) 316 U. S. 472.

The converse is true here. Petitioners were not faced with a single narrow issue of veracity but with complex and difficult questions of interpretation of the indictment, application of the rules of criminal law and pleading, and trial strategy. The factors of experience with the criminal

procedure * and ability of the accused to defend themselves, present in the *Betts* case, are lacking. These differences assure that even the majority which found that "the totality of facts" in the *Betts* case did not indicate a denial of due process would reach the contrary result here.

Furthermore, the decisions of this Court since *Betts* v. *Brady* evidence that it has been confined to its own particular facts, if not overruled. The case has never been cited by this Court as authority for upholding a conviction. Neither the majority nor the dissenting minority in *Williams* v. *Kaiser, supra,* 323 U. S. 471 (1945), and *Tomkins* v. *Missouri, supra,* 323 U. S. 485 (1945), referred to the case despite the fact that the respondent State of Missouri placed its main reliance upon it.** The doubt thus cast on its authority was expressly recognized by this Court in *House* v. *Mayo, supra,* 324 U. S. 42 (1942), where the Court stated (p. 46):

> "We need not consider whether the State would have been required to appoint counsel for petitioner on the facts alleged in the petition. Compare *Betts* v. *Brady,* 316 U. S. 455, with *Williams* v. *Kaiser, supra,* and *Tomkins* v. *Missouri,* 323 U. S. 485."

See also *White* v *Ragen,* 324 U. S. 760, 764 (1945).

Betts v. *Brady* was again ignored in *Rice* v. *Olson, supra,*

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* That petitioners have not previously been convicted appears from the failure of the State's Attorney to invoke the Illinois Habitual Criminal Statute (Ill. Rev. Stat. (1935), Chap. 38, par. 631; (1945) Chap. 38, par. 602), which would have resulted in mandatory life imprisonment for conviction of a second offense. **People v. Poepp,** 394 Ill. 216, 68 N. E. 2d 254 (1944).

** See briefs of Respondent State of Missouri in **Williams v. Kaiser,** pp. 7 et seq., and **Tomkins v. Missouri,** pp. 38 et seq.

324 U. S. 786 (1945), although the respondent State of Missouri pitched its main argument upon the decision.* Treatment in *Canizio* v. *New York, supra,* 327 U. S. 83 (1946), is even more striking, for *Betts* v. *Brady* was there cited only on the question of jurisdiction; the succeeding paragraph of the opinion, which stated the substantive rule of due process as quoted *supra,* page 23, completely ignored the case despite the emphasis placed upon it in the respondent's brief.** This pointed disregard of *Betts* v. *Brady* in many subsequent cases evidences that its authority has been limited to its own particular facts and that it is not controlling on the substantive question of the right of an accused to be represented by counsel.

III.

THE PETITIONERS HAVING BEEN DENIED DUE PROCESS OF LAW, THE SENTENCE AND JUDGMENT AGAINST THEM ARE VOID.

The denial of due process to petitioners as established in Points I and II, *supra,* renders their sentence and judgment "absolutely void." See, *e.g., Moore* v. *Dempsey,* 261 U. S. 86, 92 (1923). The question of guilt or innocence is not before this Court; it is enough that petitioners did not receive a fair trial. See *Glasser* v. *United States, supra,* 315 U. S. 60, 76 (1942):

> "• • • The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice resulting from its denial."

See also *Williams* v. *Kaiser, supra,* 323 U. S. 471, 475 (1944).

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* See brief for Respondent State of Missouri, pp. 10-11.

** See brief for Respondent State of New York, pp. 21-25.

Because of the failure to accord petitioners the right to counsel guaranteed by the Fourteenth Amendment the judgments must be reversed. See, *e.g.*, *Powell* v. *Alabama*, 287 U. S. 45 (1932); *Smith* v. *O'Grady*, 312 U. S. 329, 334 (1941); cf. *Johnson* v. *Zerbst*, 304 U. S. 458, 467 (1938).

Conclusion.

It is respectfully submitted that the judgment of the Supreme Court of Illinois should be reversed.

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April 15, 1947.